IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1898.

The United States, Appellant, vs. Serafin Pena, L. Z. & M. Z. Farwell and Jose A. Garcia, et al., Appellees.	No. 293. Appeal from Court of Private Land Claims.

BRIEF OF APPELLEES, L. Z. & M. Z. FARWELL, ON MOTION TO DISMISS APPEAL.

The motion to dismiss is as follows:

(Omitting title.)

And now come L. Z. & M. Z. Farwell, two of the appellees in the above entitled cause, by Edward L. Bartlett, their solicitor, and move the court to dismiss the appeal herein, for the following reasons, viz:

First. That such appeal was not authorized at the time it was taken, by the act of March 3, 1891, entitled "An act to establish a court of private land

claims, and to provide for the settlement of private land claims in certain states and territories." And because said appeal is without authority of law and this court is therefore without jurisdiction to entertain said appeal, it being provided in Sec. 9 of said act that the United States in case of a confirmation of a claim, in whole or in part, shall have the right of appeal to the supreme court of the United States, *such appeal to be taken within six months* from date of such decision, while the transcript in this case shows, at pages 148 and 149, that the decree was entered in the court of private land claims on the first day of December, 1896, and said appeal was not allowed until the 14th day of April, 1898.

Second. Under the said Sec. 9, it is made the duty of the attorney for the United States upon the rendition of any judgment of the court confirming any claim to notify the attorney general, in writing, of said judgment, and in any case in which such statement shall not be received by the attorney general within sixty days after the rendition of said judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of such statement. That the transcript at pages 148 and 149 shows that such notification to the attorney general, by Matt. G. Reynolds, attorney for the United States in said court of private land claims was not made by him "upon the rendition of said judgment" as required by law, but was made fifteen months thereafter, to-wit, on the 9th day of March, 1898, whereby the appellant waived and forfeited its right of appeal herein.

Third. The said Section 9 of said act provides that such appeal shall be taken in all respects and in the same manner and upon the same conditions, except in respect of the amount in controversy as is now provided by law for the taking of appeals from decis-

ions of the circuit courts of the United States, and that in the said transcript there does not appear any assignment of errors or prayer for reversal as provided for in Revised Statutes, United States, Secs. 997 and 1012.

Fourth. The said court of private land claims, from which this appeal was taken consists of a chief justice and four associate justices, and the citation in this case is not properly issued or signed by the chief justice thereof, nor was the appeal allowed by him as provided by law, but the same in the transcript appear to have been allowed and signed by Wilbur F. Stone, one of the associate justices. (Transcript, p. 149).

L. Z. & M. Z. FARWELL,
Appellees,
By EDWARD L. BARTLETT,
Their Solicitor.

POINTS AND AUTHORITIES.

I.

This appeal was not taken within the time fixed by the act of March 3rd, 1891, therefore it could not be allowed by the court of private land claims nor considered by this court.

Section 9 of that act, 26 Statutes, p. 854, in Vol. 1, Supplement to Revised Statutes, 917, provides for appeals from that court as follows:

"Sec. 9. That the party against whom the court shall in any case decide—the United States, in case of the confirmation of a claim, in whole or in part, and the claimant, in case of the rejection of a claim, in whole or in part—shall have the right of appeal to the supreme court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy, as is now provided by law for the taking of appeals from the decisions of the circuit courts of the United States.

"On any such appeal the supreme court shall retry the cause, as well the issues of facts as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the proceedings below as truth and justice may require: and on such re-trial and hearing every question shall be open, and the decision of the supreme court thereon shall be final and conclusive. Should no appeal be taken as aforesaid, the decree of the court below shall be final and conclusive.

"*Upon the rendition of any judgment of the court confirming any claim*, it shall be the duty of the attorney of the United States to notify the attorney general, in writing, of such judgment, giving him a clear statement of the case and the points decided by the court *which statement shall be verified by the certificate of the presiding judge of said court:* and in any case in which such statement shall not be received by the attorney general within sixty days next after the rendition of such judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of such statement.

"And if the attorney general shall so direct, it shall

be the duty of the clerk of the court to transmit the record of any cause in which final judgment has been rendered to the attorney general for his examination. In all cases it shall be the duty of the attorney general to instruct the attorney of the United States what further course to pursue and whether or not an appeal shall be taken."

The record here shows that the majority opinion of the court below was rendered on the fifth day of September, 1896 (Transcript, p. 135); and that the decree was entered at the November term, 1896 (Transcript, p. 144), [date not given.] Appellant in its prayer for appeal states the date of decree as December 1st, 1896 (Transcript, p. 148).

The prayer for allowance of appeal by the United States attorney was not made nor allowed until the fourteenth day of April, 1898, nearly *fifteen months after the final decree was entered.*

The allowance of the appeal and the issuance of the citation were too late to enable this court to take jurisdiction of the appeal.

Fowler vs. Hamill, 139 U. S. 549.
Whitsitt vs. Union Depot Co., 122 U. S. 363.
Scarborough vs. Pargoud, 108 U. S. 567.
Fayolle vs. R. R. Co., 124 U. S. 523.

These cases all arose under section 1008, Revised Statutes, limiting the time for appeal to two years; but the principle is the same where the time for appeal is limited, it must be taken within that time, or the right is absolutely gone; this is *jurisdictional*, and controls the power of this court to consider the appeal.

It will doubtless be claimed by the appellant here that the attorney general not having received the statement from the United States attorney within the

sixty days provided for in section 9 of the act quoted above, that the government has the right to claim six months after the attorney general should so receive it. The attorney for the United States in his prayer for appeal, not only states that the attorney general did not receive such statement within the sixty days, but that he himself did not make it until the 9th day of March, 1898 (Transcript, p. 149). He offers no excuse or explanation for his neglect of duty under the mandatory portion of said section 9 of the act, which provides:

"Upon the rendition of any judgment of the court confirming any claim, *it shall be the duty of the attorney of the United States to notify the attorney general in writing of such judgment*, which shall be verified by the certificate of the presiding judge of said court."

This imposes a duty upon appellant to do something at once upon the rendition of the judgment; preliminary to its right of appeal, then; if by error in transmission, accident, mistake, sickness or absence of the attorney general, or any other sufficient cause, he does not receive the statement, within sixty days, the government has six months longer in which to appeal. That is, the government is given eight months in which to appeal instead of six months, which the claimant has. But the appellant here claims that it can deliberately for no reason and without any excuse and from mere caprice or indifference, allow more than fourteen months to elapse before making the statement preliminary to an appeal, which the law says shall be made "on the rendition of the judgment;" and claim six months thereafter. If this can be done, the government might allow years to elapse before making the statement "certified to by the *presiding judge*," to the great wrong and injury of claimants. The court of private land claims is limited in its existence; its life has been once extended, and there is no certainty that this will again be done; to allow such

absolute failure in duty by officers of the government to accomplish the delay involved in an appeal to this court might deprive the claimant of any relief from the court of private land claims by reason of its ceasing to exist.

The neglect of the attorney for the United States to do his plain duty as commanded by the act within the time specified was gross laches of the appellant by which it forfeited its right of appeal. The latter part of the section (9) giving the government six months from the time the attorney general should receive the statement made by the United States attorney, "verified by the certificate of the presiding judge of said court," could not have been intended to make the time for appeal unlimited, and to depend upon the dilatory pleasure of the United States attorney, as to when he should make his statement. The statute itself limits the time for appeal to six months absolutely. Afterwards it gives the United States an additional sixty days upon complying with certain requirements on its part, making a total of eight months from the rendition of the judgment in which the United States may take its appeal.

This is the first time the question has been presented to this court under the act establishing the court of private land claims, in which there are many cases now pending, and others have been determined against the government, which will be seriously affected by the decision on this motion; and it is submitted that section 9 of the act will not bear the extended construction claimed by the appellant, but, that under the previous decisions of this court and the fair interpretation of the language of the section this motion must be sustained.

II.

Section 9 of the act further provides that, "such appeal is in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States." These latter provisions are found in Revised Statutes of the United States, Sections 997, 999, 1012, and in Rule VIII of this court. Section 997 requires that, "there shall be annexed to and returned with any writ of error for removal of a cause at the day and place therein mentioned, an authenticated transcript of the record *an assignment of errors, and a prayer for reversal with a citation to the adverse party.*" These provisions are required on appeal the same as in writs of error by Section 1012. An examination of the transcript in this case will not show any assignment of errors or prayer for reversal as required by law, and for this failure the court should dismiss the appeal herein under

Paragraphs 4 and 5 of Rule 21.
Bonites vs. Hampton, 123 U. S. 519.
United States vs. Curry, 6 How U. S. 106-113.
Boston Mining Co. vs. Eagle Mining Co., 115 U. S. 221.
Dugger vs. Taylor, 121 U. S. 286.

III.

The court of private land claims, from which this appeal is attempted to be made, consists of a chief

justice and four associate justices. See Section 1 of the act establishing this court. The appeal in this case was allowed and the citation signed by Wilbur F. Stone, one of the associate justices, and not a *presiding judge* (Transcript, p. 149). This was not a compliance with Section 9, Revised Statutes.

Bartmeyer vs. Iowa, 14 Wall 26.

In this case the court says, at p. 28:

> "We are of opinion that the act of congress requires that when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a justice of the supreme court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the supreme court of the United States."

This case and the language of the opinion is quoted and approved in *Havnor vs. N. Y., 170 U. S. 410*, decided at the last term of this court.

While these are cases from state supreme courts, it is submitted that the language and reasoning applies to any court composed of more than one judge having a chief justice.

The "presiding judge of the court" must verify the statement made by the United States attorney to the attorney general. On principle, should not he allow the appeal and sign the citation under the authorities cited above?

Revised Statutes, Sec. 999, expressly provides that "the citation shall be signed by a *judge of said circuit court*, or by a justice of the supreme court." Plainly indicating the distinction between a *circuit judge*, and a justice of the supreme court, *sitting* as a circuit judge.

There is only one circuit judge in a circuit. *Revised Statutes, Sec. 607.* But the circuit courts may be *held* by the circuit justice, the circuit judge, or by

the district judge sitting alone, or by any two of said judges sitting together:

Revised Statutes, Sec. 609.

If the court is held by the two former, or either alone, the appeal may be allowed and citation signed by either. If by the circuit and district judge, then under Sec. 999, it must be allowed and signed by the circuit judge; and if by the district judge alone, he must alone allow the appeal and sign the citation as, "sitting as circuit judge." So, under no circumstances, could there be the difficulty suggested in the cases cited, where the court is absolutely composed of three or more judges with a chief justice, who presides and represents the court.

For which reasons it is respectfully urged that the appeal in this case should be dismissed for lack of jurisdiction.

EDWARD L. BARTLETT,
Solicitor for Appellees, L. Z. & M. Z. Farwell.

To Hon. Matt. G. Reynolds, Attorney, United States Court Private Land Claims, No. 418 1-2 Olive St., St. Louis, Mo.:

You will take notice that the appellees, L. Z. and M. Z. Farwell, in the above entitled cause have filed their motion to dismiss appellant's appeal herein, for reasons stated therein, in the supreme court of the United States, a printed copy of which, together with their brief of argument thereon, is hereto attached, and that the time fixed for submitting such motion in such supreme court is Monday the 17th day of October, A. D. 1898.

Very respectfully,
EDWARD L. BARTLETT,
Solicitor for Appellees, L. Z. &M. Z. Farwell.

Territory of New Mexico, } ss.
County of Santa Fe. }

Edward L. Bartlett, being first duly sworn, deposes and says that he is the solicitor for the appellees, L. Z. and M. Z. Farwell, that on the 27th day of August, 1898, he deposited in the postoffice at Santa Fe, New Mexico, the notice, motion and brief of which the above and foregoing is a true and correct copy, directed to the proper address of Matt. G. Reynolds, attorney for appellant, as the same was given to affiant by W. H. Pope, the assistant in office of said Reynolds, as attorney for the United States court of private land claims, to wit: No. 418½ Olive street, St. Louis, Mo. That the postage thereon was fully prepaid, and that in due course of mail said notice, motion and brief should reach counsel for appellant, more than thirty days before the time fixed by said notice for the hearing of said motion.

Edward L. Bartlett

Subscribed in my presence and sworn to before me this 27th day of August, A. D. 1898.

Notary Public.

IN THE SUPREME COURT
OF THE
UNITED STATES,
October Term, 1898.

The United States, Appellant, vs. Serafin Pena, L. Z. & M. Z. Farwell and Jose A. Garcia, et al., Appellees.	No. 293. Appeal from Court of Private Land Claims.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

This appeal brings up the three cases from the court of private land claims, Nos. 99, 153 and 233 in that court, which were consolidated and tried as one case there, the claimants being all for the validity of the grant and praying its confirmation against the United States, although under different theories as to whom the grant enured. The claimants in No. 99 and 233 contending that it was a *community* grant for the benefit of Jose Julian Martinez, the petitioner *and* the 35 others who were put in juridical possession by the alcalde under the direction of the governor as joint owners—Transcript, p. 1, 2, 3, and 18.

The petitioners in No. 153, claimed under the same grant and act of possession, but that the petitioners alone viz, Jose Julian Martinez, Antonio Martinez, and Francisco Antonio Atencio were granted this land, and were

alone placed in possession (except as to the small tracts mentioned) and that the entire grant enured to the benefit of the three petitioners mentioned—Transcript, p. 15-16.

A true translation of the original petition, grant and act of possession as introduced in evidence is as follows:—

Transcript, p. 121-122."

EXHIBIT C FOR PETITIONERS IN CASE NO. 153.

Translation of document marked "Exhibit B."

Seal third (seal). Two reals.

For the years one thousand eight hundred and thirty-six and eight hundred and thirty-seven.

Respectable Ayuntamiento: I, Jose Julian Martinez, resident of this jurisdiction, appear before your honor and, together with my father, Antonio Martinez, Francisco Antonio Atencio, and the sons of the latter, with all submission and under the most legal protestations, represent and state—

That it being our intention to engage in recommendable occupation of agriculture, so as by this mode to aid in the support of our families, and being satisfied that up the river from this jurisdiction there is a tract of public land, which is called the Petaca, we therefore pray your honor that, in case no injury would result to any third party, and you know of no individual owning said land, which your honorable body will please ascertain, and inform the illustrious provincial deputation whatever you may deem proper in respect to our application, which is a favor we solicit, etc.

Ojo Caliente, January 29, 1836.

JOSE JULIAN MARTINEZ.

The respectable ayuntamiento, over which I have the honor to preside, inasmuch as that the parties in the grant accompanying the foregoing petition have not cultivated nor placed any kind of improvements on the land which was given them in the long period of full 12 years, and which is now again applied for, are of the opinion that the same should be granted the *the* new applicants for the reason that the former have forfeited the right granted them for the cause stated and under the conditions expressed in said grant; observing that this ayuntamiento also believes that the children of Francisco Antonio Atencio should not become a party in the said possession, as they are minors, subject to paternal control, and do not

possess the knowledge necessary to empower or give authority to petition in their name for that which they are not in a condition to acquire in this manner.

The most excellent deputation will direct as may be most in accordance with the laws.

Ojo Caliente, February 22, 1836.

JOSE ANTONIO MARTINEZ.

JOSE JULIAN MARTINEZ, Secretary.

Santa Fe, February 25, 1836.

Having seen the action of the ayuntamiento of Ojo Caliente of date 22d instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right herein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession, and without prejudice to any third party; also binding the grantees to the obligations prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonios therefrom, as may be requested of him, on payment of his corresponding fees.

PEREZ.

Seal fourth (seal). One cuartilla.

For the years one thousand eight hundred and sixty-six and eight hundred and thirty-seven.

At Santa Cruz del Ojo Caliente, jurisdiction of this name, on the twenty-fifth day of the month of March, one thousand eight hundred and thirty-six, in compliance with the decree of the civil and military governor of the Territory of New Mexico, Alvino Perez, of date February 25, of the same year, in which he directs me to place in possession the petitioners who have applied for the Petaca tract of land, and is set forth in their petition of date 29th of January, of the same year, I proceeded to distribute said land in the presence of the parties interested, giving to each one of those mentioned in the list one hundred and fifty varas in a direct line, designating to them as their boundaries on the south the entrance to the canoncito and lands of Jose Miguel Lucero, on the north the hill commonly called the Tio Ortiz Hill, on the east the creek of the aguaje of the Petaca, and on the west the boundary of the Vallecito grant, within which limits the said new

grantees were located. Of these I donated only to citizen Felipe Jaquez from the boundary of Vicente Martin to that of Eusebio Chaves, the land being a narrow strip and of little utility; thereupon I donated to citizen Manuel Lujan two small valleys, which were not measured with the line and reach to the distribution of the said canoncito, and I donated to citizen Mariano Pena two small valleys, very narrow, without varying; and, continuing, I donated to citizen Antonio Eluterrio Ortiz, in the same canoncito, a small valley, also without varying; following the same course in the said canoncito, I donated to citizen Jose Francisco Lucero a small valley, also without varying, and to Jose Antonio Lucero another small valley, the boundary thereof being on the south the mouth of the same canoncito, leaving therefor a plaza one hundred and fifty varas, and fifty for women's gardens and fifty for ingress and egress, there remaining at the mouth of the canada de la Dorada, for common watering places, one hundred and fifty varas in a direct line, which donation I made in the name of the national sovereignty, in conformity with the law on the subject, the grantees mentioned in the annexed list understanding that the pastures, forests, waters, and watering places are in common, and they were further informed that he who fails to occupy and cultivate the land granted within the term of five years, in order to acquire title, the same cannot be by him sold, exchanged, nor alienated, nor will he be admitted in a new settlement; and if any should of their own accord abandon the tract, they remain informed futher that they possess no right, such being the requirements of law; and being informed of and agreeing to all this, they received the accepted possession, in virtue of which they plucked up herbs, leaped, cast stones, and shouted with joy saying, God be praised, long live the nation, long live the sovereign congress and the law that governs and protects us, and other manifestations of pleasure, by virtue of which they took possession; and, that it may so appear at all times, I, under this decree, signed this grant and donation with all the authority his excellency was pleased to confer upon me for the purpose set forth in the above petition and expressed in said decree attached to the present grant, the witnesses being the citizens Jesus Maria Barela and Jose Francis Lucero, as properly made.

JOSE ANTONIO MARTINEZ.
JESUS MARIA BARELA.

There was given to Juan de Jesus Jaquez from the

boundary of Jose Gabriel Vigil to a pinabete on the north; valid

(Rubic)

List of the citizens who took possession [of][in] the Petaca grant of land, as set forth in the grant, on the other side of this, to wit:

Miguel Trujillo, Juan de Jesus Olgurin, Lorenzo Griego, Francisco Valdez, Francisco Vigil, Juan de Jesus Vigil, Joaquin Martin, Jesus Ma. Barela, Jose Antonio Lucero, Jose Gabriel Vigil, Juan de Jesus Jaquez, Juan de los Reyes Sena, Carlos Torres, Antonio Feliciano Martinez, Jose Bernardo Torres, Benito Martin, Felipe Jaquez, Eusebio Chaves, Antonio Jose Martin, Antonio Jose Chaves, Sabino Chaves, Antonio Martines, Francisco Antonio Atencio, Jose Julian Martin, Jose Julian Sanches, Amador Sanches, Jose Francisco Roibal, Juan Antonio Chaves, Antonio Trujillo, Jose Trujillo, Jose Ma. Jaquez, Manuel (defaced), Mariano Pena, Luterio Ortiz, Jose Francisco Lucero, Jose Antonio Lucero.

The foregoing translation made by me from the Spanish is correct, to the best of my knowledge and belief.

SAM'L ELLISON.

Subscribed and sworn to before me this the 12th day of February, 1875.

JAMES K. PROUDFIT,
U. S. Surveyor General.

Surveyor General's Office.

Translator's Department, Santa Fe, N. M., February 18, 1875.—The foregoing translation, having been by me compared with the original in Spanish and found correct, is hereby adopted for the official translation.

DAV. J. MILLER,
Translator.

Surveyor General's Office.

Santa Fe, N. M., July 21, 1883.—The foregoing is a correct copy of the original paper on file in this office in private land claim No. 105, known as the Petaca grant.

Witness my hand and official seal.

HENRY M. ATKINSON,
Surveyor General.

On the trial there was introduced in evidence, a series of papers signed by Salvador Lucero, prefect of Rio Arriba county, and Jose Vicente Jaramillo, justice of the peace of the same county, dated in March, 1848, which

are orders to notify individuals who might desire to be placed in possession of the Petaca grant, together with "a general list formed at the new possession which they commonly called LA PETACA, made today the 27th of March, in the year of our Lord, 1848, in conformity to the superior decree of the prefect, Don Salvador Lucero, where he orders me that I place in possession those citizens who justly may have died or are not present * * * I stated in a loud voice that I was going to measure the land in the name of the Territory of New Mexico, and that they shall receive the concession in the name of the constitution of the United States, etc."

Then follows a list of 39 persons, after which the justice certifies "they took possession of it by the authority and in the name of the Territory of New Mexico and respecting the Constitution of the United States." See transcript pp. 131 to 134.

Afterwards on the tenth of June, 1848, 22 others were placed in possession by Jose Rafael Pena, "who was commissioned for that purpose by the alcalde, Jose Vicente Jaramillo." See transcript pp. 134-135.

These last two documents were offered in evidence by the United States on the trial.

The court, by three judges, rendered an opinion that this grant was genuine; that the governor had power to make it, and that juridical possession was given to the petitioners and the 33 others accompanying them named in the list, and that the title to the grant vested (to the extent of 11 square leagues) in the 36 named in the list. That the same was not abandoned by these grantees, and closes with the following: "The evidence shows that in 1848, a number of persons took possession of the tract claiming it under the grant; that among these were a number who were original grantees and distributees in 1836, *these latter were certainly owners at that time*, and their acceptance of possession in connection with the others and in recognition of their right in the tract, is sufficient to

warrant the confirmation in the name of all those who took possession in 1848, for the benefit of all parties in interest." See transcript, p. 135 to 139.

The chief justice did not concur in this opinion, stating that in his opinion the grant should be for the whole amount claimed and for the benefit only of the persons who petitioned for the grant. See transcript, p. 139-140.

Mr. Justice Murray differed from both these opinions, and in his dissenting opinion held that the grant was absolutely void, that it did not comply with any of the requirements of the law at the time it was made, and that the claim should be rejected and the petition dismissed. See transcript, pp. 140-143.

A decree was entered in accordance with the majority opinion, limiting the area of the grant to 11 square leagues, and confirming it "to those persons, who in the year 1848 were placed in possession of the said Petaca tract" naming them to the number of 40.

From this decree, the United States attempted to take its appeal to this court by filing a transcript in this case in which there is a motion by appelees to dismiss such appeal which is now pending.

POINTS AND AUTHORITIES.

This grant was not petitioned for, recommended or given as an *original* grant. The ayuntamiento or town council, in its report to the political chief stated that, "inasmuch as that the parties in the grant accompanying the foregoing petition have not cultivated nor placed any kind of improvements on the land which was given them, in the long period of full twelve years, and which is now again applied for, are of opinion that the same should be granted, the new applicants, for the reason that the former have forfeited the right granted them, for the cause stated, and under the conditions expressed in said grant." See transcript, p. 120.

The political chief upon this report decided that "the former grantees not possessing now any right herein, they having abandoned the same the alcalde of said place, will place those who apply for the same in possession thereof." See transcript, p. 122.

From which it is apparent that previous to the decision in 1836, there had been a grant of this tract and title had passed from the government of Mexico or Spain, and that this action of the political chief in 1836, was simply to revalidate or revive the grant which had theretofore been made, and which had not up to that time been denounced. It is made further apparent by the report of the ayuntamiento, referring to "the grant accompanying the foregoing petition."

The petition and other proceedings in this case were had under the colonization laws of Mexico, of August 18, 1824, and the regulations thereunder of November 21, 1828. ((And it is a strong circumstance in their favor that they were upon *stamped paper* which was a government monopoly, and only used on official documents.)

See: Reynolds Spanish Mexican Land Laws, pp. 121, 141-143.

And appellees claim that the record here shows these laws and regulations have been substantially complied with.

Article 1, of the regulations authorizes the political chiefs of the territories to grant the public lands of their respective territories to the contractors, families, or private persons, Mexicans or foreigners who may apply for them, for the purpose of cultivating them or living upon them.

Article 2, provides that every applicant shall apply to the political chief of his territory in which application is to be given his name, country, profession, the number, nature, religion or other circumstances of persons whom he desires to colonize. The petition in this case complies with this regulation, except that instead of being addressed to the political chief direct, it is to the ayuntamiento of the vicinity of Ojo Caliente, asking that body to present the matter. Nor is the religion of the petitioners described in this application. Nor is a map submitted.

Article 3 provides that the political chief shall immediately proceed to inform himself as to the merits of the application, "and shall at the same time hear the respective municipal authority, as to whether any objection or not is found to the grant." This was done in this case.

Article 4, provides, "in view of all which the political chief shall grant or not said application in strict conformity with the law."

Article 5, "the grants made to private persons or families, shall not be held to be definitively valid, without the previous consent of the territorial deputation, for which purpose the respective proceedings shall be forwarded to it."

Article 6, "when the political chief shall not obtain the approval of the territorial deputation, he shall report to the supreme government forwarding the proceedings in the matter for its consideration."

Article 7, is in reference to the proceedings for the "colonization of many families," which does not apply here.

Article 8 provides that "the political chief shall issue a document to serve as a title to the party in interest."

Article 9 provides for the entering of the application and grant in a book intended for the purpose, a detailed report of all which shall be forwarded to the supreme government every quarter.

There is nothing in these proceedings to show that any such entry was made, but this was no fault of the grantees, it was a ministerial duty which they had a good right to suppose would be performed by the officer charged therewith, as was the approval of the territorial deputation to the act of the political chief as provided for in article 5, *supra*, and, if the territorial deputation should not approve the grant it was to be reported to the supreme government—article 6, *supra*.

That this failure or neglect on the part of the public officers to perform their duty, would not operate to the injury of the grantee, see:

Hornsby et al. vs. U. S. ,10 Wall., 224.

Article 10 refers to contractors for a new settlement.

Article 11 provides that "the political chief shall set a reasonable time for the settler in which he must necessarily cultivate or occupy the land in the terms and with the number of families which he is stipulated, in the intelligence that if he does not do so, the grant of the land shall be void, *but the political chief may, nevertheless, revalidate it in proportion to the part in which the party in interest has complied.*"

In this act of "revalidation" the political chief was authorized to act *alone* without referring the grant to the territorial deputation, or the supreme government for approval; and in this case the petition, report of the Ayuntamiento, and the grant of the political chief *all* show that this was a revalidation or regrant upon the application of the petitioners. Under the regulations, article 1, the political chiefs of the territory have absolute authority to grant the public lands to private persons, Mexicans or foreigners, under the conditions stated in the regulations. He

shared this power with no one; it was absolute; after he had acted he referred his acts to the departmental assembly, which, only, possessed the power to approve or disapprove, and until such approval, the estate was subject to be defeated by some *act* of the government the exact nature of which is not known, as I am not aware of any record showing the departmental assembly ever refused to approve, and if it did, then it was the duty of the governor to report the case to the supreme government, beyond which, nothing is stated in the law or regulations, and in White's Recopilacion, he says he has been unable to discover a record or notice of the proceedings upon some grant or possession which have been made by a captain general, intendant or governor and disapproved of by the king; and he had been unable to ascertain whether such was the case; see,

U. S. vs. Clark, 8 Peters, 459.
Hornsby vs. U. S., 10 Wall., 224.
U. S. vs. Reading, 18 How., p. 1.
U. S. vs. Cervantes, 18 How., 553.

At the most, the effect of the failure of the political chief to report his acts to the departmental assembly would be to suspend the "definitive" validity of the grant, that is it prolonged the liability of the estate to be defeated by the *action* of the assembly and of the supreme government, and no other consequences followed." His neglect was not permitted to operate to divest the grantees of the estate already vested in them, and in passing upon claims on a Mexican grant this court cannot inquire into any acts or omissions of the Mexican authority since they were displaced—*it is not authorized to pronounce a forfeiture for anything done or anything omitted by them since that period.*" The language used in Hornsby vs. United States, 10 Wallace, p. 239.

In the same case, at page 240, the court says: "The interest of a grantee could not be divested under the Mexican law any more than at the common law upon mere allega-

tions or surmises. Some formal and regular proceedings were required to effect such divestiture; and under the Mexican law these had their inception in what is termed a "denouncement" by a party desirous of obtaining the land; an investigation then followed whether or not the condition had been complied with, or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree, the title did not revert to the government, nor was the land subject to be re-granted."

And whether this Petaca grant of 1836 be considered an original grant, or a revalidation of a previous grant upon a denouncement by the petitioners and the finding by the Ayuntamiento and political chief, is immaterial for the purposes of this case, as in either event the title had passed to the grantees by the juridical possession given under the directions of the political chief more than 12 years prior to the change of sovereignty from Mexico to the United States.

The case of Hornsby referred to above in *10Wallace,* is much later than the Peralta case, and the other cases cited by the learned Justice Murray in his dissenting opinion in the court below.

Each of which cases was determined upon the particular facts. As in the Peralta case, the court says: "If the grant had been made and recorded in the proper office, *possession* would have been given to the grantee of the lands which were conveyed." Which was not done in that case, and was done in this, and all of these grants referred to by Justice Murray were made in 1846, immediately before the American occupation, and under circumstances of more or less suspicion, as in the Castro case, 24 Howard, 348, the court says: "And nothing was then produced to support the grant but this paper; no petition from Castro, no *informe* or decree, nor act of juridical possession." So in the case of U. S. vs. Knight, administrator, 1 Black, 227: Grant claimed to have been made by Pico in 1846. There was no order of reference or *juridical possession*, and the court says, "Taken together, these various considera-

tions throw great distrust upon this document, and justify the conclusion that it is entitled to little or no weight." The court then goes on to consider the parol proof which was equally unsatisfactory. So in the case of the U. S. vs. Cambuston, 20 Howard 59. The court says, at page 62:

"The case stands, so far as the claim of title is concerned, upon the naked document itself, purporting to be a donation of the 11 square leagues of land, together with evidence tending to establish its genuineness and slight proof in respect to the possession of the tract."

And again, at page 64: "In the examination of the evidence in this case, we have found it very difficult to resist a suspicion as to the *bona fides* of the grant in question. * * * It was made but a month and a half before the country was taken possession of by the arms of the United States, and made by a person who had but recently expelled from the territory by force its lawful Governor (Michaeltoreno) and had taken possession of it himself: whether or not Pico had been recognized by the existing government in Mexico, at the time the grant is dated (May 23, 1846) does not appear."

And in the case of Barreyesa vs, U. S., referred to by Mr. Justice Murray in his dissenting opinion, reported in 23 Lawyers' Co-operative Edition, p. 913, which is not reported in the regular U. S. reports, none of the facts are given, and the court says: "We are unable to distinguish it from the large number of cases to be found in our reports." Referring, then, to the above cases, from which it is evident there were certain facts in *that* case as in the others, which induced the decision of the court beside the mere absence of the record of the grant.

Article 8 of the regulations referred to above, provides that the political chief shall issue a document to serve as a title to the party in interest, and article 9, that the corresponding entries of all the applications and grants made, shall be made in a book intended for the purpose. It does not state *who* shall make these entries; it certainly was

not the duty of the grantee, but of some officer of the government, perhaps the political chief, although none of the regulations so state, and his connection would seem to cease when he issues the document to serve as a title. The presumption of law is that all officers do their duty.

U. S. vs. Peralta, 19 Howard, 347.
U. S. vs. Aredondo, 6 Peters, 729-731.
U. S. vs. Delassus, 9 Peters, 134.
Hornsby vs. U. S., 10 Wall., 234.
U. S. vs. Reading, 18 Howard, p. 1.

In the present case the court, in its majority opinion at page 136, says: "The genuineness of the grant and the power of the governor to make it has not been contested on this trial."

And on page 137, "The action of the alcalde in placing the 36 in possession and the acquiescence in, and acceptance of such action on the part of the principal petitioners, is strong confirmatory proof that the principal petitioners, Martinez and his father, and Atencio, were acting on behalf of the entire body of settlers."

There is no suggestion in the pleadings or the proof that there was any irregularity, fraud or imposition on the part of the plaintiffs or any of their predecessors, and while there were disputes as to the northern and eastern boundary, they were decided against the petitioners in the trial court, and the United States in this case stands *solely* for its contention upon the ground taken by Mr. Justice Murray in his dissenting opinion, that because some officer of the Mexican government was not shown affirmatively to have performed his duty, in placing the papers upon the record, that this grant by the political chief and governor who had full power to make it, was absolutely void and can not be recognized by this government. We do not contend that the decree should go to those settlers who were placed in possession of the tract under the remarkable proceeding of the justice of the peace in 1848 by which he placed the

first named in possession "in the name of the Territory of New Mexico and of the constitution of the United States." —Transcript, p. 132. But, we do contend that this grant should be confirmed to the 36 persons, who were placed in juridical possession by order of the political chief in 1836, if not solely to the three petitioners.

By the treaty of Guadalupe Hidalgo, of February 2d, 1848, under article 8, 9 Stat., 922-929, property rights were guaranteed, and, "in the said territories, property of every kind now belonging to Mexicans not established there, shall be inviolably respected."

By the Gadsden treaty of December 30th, 1853, 10 Stat., 1031-1035, in article 6, it was provided that "no grants of land under that treaty or any grants made previously, be respected or considered as obligatory *which have not been located and duly recorded in the archives of Mexico*, and this is the only place in either the United States or Mexican law providing for such grants to be recorded under a *penalty* of their *not being recognized by either government*, and we claim that under this grant, or revalidation of the original grant, the successors in interest of the original grantees, to wit, the claimants in this case, would have had a lawful *right* to make perfect had the territory not been acquired by the United States, and that this claim was not one "of grace or favor." It was the juridical possession which terminated the sovereignty of Mexico over this tract of land and vested it in the petitioners and those who were with them.

Moore vs. Steinbach, 127 U. S., 70-80.
U. S. vs. Sutter, 21 Howard, 170-176.

In this last case the court says, at page 178: "We know of no law of the United States which authorizes us to pronounce a sentence of forfeiture for any act or omission since the date of the treaty."

Malarin vs. U. S., 1 Wall., 284-289.
U. S. vs. Pico, 5 Wall., 539.

Wherein Mr. Justice Field, speaking for the court, says: "This proceeding (juridical possession) involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, especially designated for that purpose, and has all the force and efficacy of a judicial determination. *It bound the former government and is equally binding upon the officers of our government.*"

This was a grant in *presenti*, and the act of juridical possession made it absolute.

Hornsby vs. U. S., 10 Wall., 224-240.
Ferris vs. Coover, 10 Cal., 617.

This grant is within the requirements laid down in U. S. vs. Santa Fe, 165 U. S., 715; and in U. S. vs. Sandocal, 167 U. S., 293.

In the latter case the claim was made that the grant was a *community* grant and much stress is laid upon the wording contained in the act of juridical possession, while in this cas, it was an individual grant under the colonization laws, the juridical possession was absolute with no conditions, except cultivation for five years, and the conclusive presumption is from the fact that there had been no denouncement of the grant, that it had been fully complied with; and at all events it was a "condition subsequent" which did not affect, the grant taking effect at once upon juridical possession being given.

Ferris vs. Coover, 10 Cal., 589-615.
U. S. vs. Clarke, 8 Peters, 451 et seq.
Freemont vs. U. S., 17 Howard, 558-561.
Hornsby vs. U. S., 10 Wall., 224-240.
U. S. vs. Chaves, 159 U. S., 452-463-4.

The authority of the governor to make this grant, and the validity of his signature, and the juridical possession are all conceded; and this grant in the hands of the grantees was as efficacious for transferring the title under the Mexican law, as is a patent from the United States gov-

ernment under our system. With us a patent for land is required to be recorded in certain books kept for that purpose in the City of Washington, and numerous prerequisites are necessary to the issuing of a patent. Yet, the possession of the patent by the patentee is conclusive that all the proceedings, rules and regulations necessary to the issuance of a patent have been complied with, and it can only be attacked in a direct proceeding to set it aside for fraud.

Johnson vs. Drew, 171 U. S., 93-99.

This we claim was the case under the Mexican law, and as no proceedings for denouncement had taken place, from the date of the juridical possession, 1836, down to the American occupation in 1848, the conclusive presumption is that this tract of land had passed from the possession of the Mexican government, and was "property" in the hands of private persons, such as was protected by the treaty of Guadalupe Hidalgo; see,

Hornsby vs. U. S., 10 Wall., 240.

And while we believe the court erred in decreeing the property to those who were placed in possession in 1848, under the extraordinary action of the justice of the peace above referred to, and indeed in decreeing it to *any* one except the three petitioners in the grant proceedings, yet we contend that the decree must be affirmed in so far as the appellant is concerned, in that it confirms the grant, and divested the United States of any interest therein.

All of which is respectfully submitted by

EDWARD L. BARTLETT,
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No. 72.

Add'l Brf. of Counsel for Appellee

Filed Oct. 26, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 72.

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Additional Brief and Argument of Appellee.

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I.

This appeal should have been taken within six months from the date of the decision.

It was a decision confirming the claim "in part" only, and not the claim as presented.

The first paragraph of section 9 of the act creating the Court of Private Land Claims provides absolutely and unconditionally that the United States in case of the confirmation of a claim "in whole or in part" shall have the right of appeal to this court, such appeal to be taken within six months from the date of the decision.

We contend there is no qualification of this provision when the confirmation is "in part," and that the third paragraph does not modify it or create a saving of the right of appeal in a case where the confirmation is "in part" only.

Appeals to this court have been strictly construed and required to come within the letter of the law. Therefore when a claim is confirmed *in part only* the appeal must be taken within six months from the *date* of the *decision*.

The third paragraph is different in language from the first. It omits the provision about confirmation *in part* and provides:

> "*Upon the rendition of any judgment of the court confirming any claim*, it shall be the duty of the attorney of the United States to notify the Attorney General, in writing, of such judgment, giving him a clear statement of the case and the points decided by the court, *which statement shall be verified by the certificate of the presiding judge of said court;* and in any case in which such statement shall not be received by the Attorney General within sixty days next after the rendition of such judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of such statement."

Evidently Congress made a distinction as to the right of appeal between claims which were confirmed as a whole and those confirmed "in part" only; otherwise why did it insert "in whole or in part" in the first paragraph and omit it in the last? It must have intended that only when the claim presented was confirmed as presented and not "in part" the United States attorney should notify the Attorney General, and the right of appeal be allowed within six months after receipt of the notice.

This court has repeatedly held in substance that the rights, duties, and obligations under the act creating the Court of Private Land Claims were statutory, and that the

letter of the law must govern, and no presumptions could be indulged.

Appellee insists that a comparison of the first and third paragraphs of section 9 of said act shows that there must have been a difference intended by Congress, when it gave the right of appeal, between a confirmation of a claim "in part" and the saving provision of the third paragraph, which gave an additional time for appeal when "the claim" is confirmed. Otherwise, why not have used the same language in the two paragraphs?

The court must hold that by the use of different expressions Congress must have intended to provide for an additional right in the case of a confirmation "in whole" and not in part only.

It is a rule of construction of statutes that expressions used in the statute different in terms from other expressions in the same statute and referring to the same character of subject will not be held to mean the same thing, but should be construed to provide something different the one from the other.

If the third paragraph was intended to embrace all claims confirmed "in whole or in part," then why did not Congress use the same language in the first paragraph and omit therefrom the words "in whole or in part"? Why did it emphasize them by repeating them twice?

II.

It is submitted the United States attorney had no right to *deliberately* and *designedly* omit to notify the Attorney General of the decision for fifteen months, during which time innocent purchasers may have acquired property, and then, when all seemed to be settled, make a report and be allowed to appeal; nor can his act be excused by the approval by the Attorney General thereof. It only shows that the spirit of the law, which was to settle and close up

speedily the adjudication of these land titles, was being evaded on a mere speculation.

The third paragraph of the ninth section certainly contemplated a notice within sixty days. If it was not received in that time, there should be some other excuse—such as sickness, death, or miscarriage—and not a deliberate and intentional failure, as confessed in appellant's brief.

The spirit as well as the letter of the law should be insisted upon.

The claim of appellant's attorney that he was waiting for decisions in the cases of U. S. *vs.* Santa Fé, 165 U. S., 715; U. S. *vs.* Sandoval, 167 U. S., 278, and Rio Arriba L. & C. Co. *vs.* U. S., 167 U. S., 298, involving the status of the lands which were alleged to have been granted for the formation of towns, cities, and communities under Spanish and Mexican law, and that if the Government's contentions therein were sustained, then the grant involved in this case would not be entitled to confirmation at all, is absolutely without foundation, as none of these cases were under any Mexican law, but were all under Spanish law, an entirely different law and different provisions from that involved in this case, which is under the Mexican law of August 18, 1824, and the regulation of November 21, 1828, this grant having been made before the constitution of 1836, and is situate in that part of New Mexico annexed under the treaty of Guadalupe Hidalgo, 1848. The laws of Spain regulating the granting of lands were not in force in New Mexico when this grant was made, but the colonization law of 1824 and the regulations thereunder were in force and provided directly for settlement and cultivation, and gave the lands directly to the individuals, grantees, or empresarios, and made no reservations of any right in the Government except the right of forfeiture to be determined by a denouncement proceeding.

III.

The grant in the case was made to those who petitioned for it by their names, to wit, Jose Julian Martinez, Antonio Martinez, and Francisco Atencio.

The grant preceding, while complying with the law of August 18, 1824, and regulation of November 21, 1828, is in the nature of a denouncement proceeding also, whereby a former grant is sought to be declared forfeited and regranted to them. They showed a former grant to other parties; that the same had been abandoned for twelve years, and an adjudication was had that it had been forfeited and should be regranted to them. The ayuntamiento of Ojo Caliente also recommended that the children of Francisco Antonio Atencio should not be admitted as grantees because they were minors, thus recommending the grant to the three persons named in the petition.

It was the custom and practice in the case of a denouncement of land or a mine to adjudge or regrant it to the same parties who had initiated the denouncement proceedings.

The governor, acting upon the report of the ayuntamiento, granted the land and directed the alcalde of Ojo Caliente to "place *those who now apply for the same*" in possession thereof in the required form and in conformity with the law on the subject, setting forth the *general donation*, in which shall be "necessarily stated the boundaries of said possession," &c. Here is a positive direction to place in possession those "who now apply for the same," thus making the grant to those individuals who are by name mentioned in the application.

The alcalde delivered the possession of the land under the decree and designated the boundaries as directed by the governor, but he also placed in possession several additional persons, all of whom seem to have taken the possession by mutual agreement and understanding with the three peti-

tioners, evidently as settlers under an empresario grant. The three grantees were also placed in possession, and all occupied it, cultivated and lived upon it, from that time, at least, until the commencement of war with Mexico and ever since to the present time.

The evidence shows, without contradiction, that the grant is genuine and the signature to the act of juridical possession is genuine. There is a claim that there has been an attempt to change the eastern boundary in the juridical possession, but the words which were first written are easily determined and are given in the decision of the land court which adopted them as the eastern boundary. Jesus Ma. Barela's evidence (p. 124) shows he was secretary of the alcalde, and signed with the alcalde the act of juridical possession which he personally wrote, and was present when the possession was given. He was afterwards justice of the peace, succeeding the alcaldes, which office disappeared with the Mexican government and was succeeded, under the American system of government, by a justice of the peace. He was the party with whom the possession of the grant papers was found.

The governor's granting decree, pages 130–131, directs the alcalde to take charge of the general document of distribution which should be for the archives, and that he should give testimonies therefrom as the same might be requested. Barela succeeded as justice of the peace in that precinct under the American Government and had the possession of the grant papers and delivered them to the parties when they commenced the proceedings before the surveyor general; so there cannot even be a contention that they came from private hands.

If they did, still their genuineness is clearly established and not denied. Even as to the change which it is claimed exists in the act of juridical possession, as Barela, the secretary, says he wrote that act of juridical possession himself. Either the change was made before the document was placed

in the archives of the alcalde, who signed it, or it must have been made after it was first used in the surveyor general's office, as Barela says in his evidence that he wrote it and mentions no alterations. As an explanation, might Barela not have written the document at the time, and might not the alcalde have made or directed the change before signing it? There is no pretext of concealment of the alteration. The original words are left so they can be easily read, and the others are written over them. This certainly is not the act of a forger or of one who desired to conceal or deceive. It looks as if made honestly, and Barela's evidence so implies. Still, the original is plain and is made out by the court, who found the original to be the correct boundary.

This grant paper comes from official hands—that is, the justice of the peace who succeeded the alcalde who was made its custodian by the governor. Appellant's Exhibit C, page 131, also shows that the alcalde was the custodian of the grant in 1848, and says it ought to be in the archives under his charge. This recognizes the grant and its custody twelve years after its execution. Even if the grant papers did not come from official hands or its possession is not accounted for, still it is admitted to be genuine, and the grantees and their legal representatives have ever since held possession.

The possession was proven beyond all question. It was delivered by the alcalde, to start with, and the parties all entered under him, and the presumption is they continued in possession, and it devolved on the Government to show the contrary, which has not been done. Yet the evidence is conclusive. SERAFIN PENA, page 13, says: "Said town of Petaca was as such in existence at the time of the occupation of New Mexico in 1846 * * * I have examined the list of the Petaca settlers and grantees now handed me by the surveyor general and well remember all of them personally, with very few exceptions, as residents and settlers at said Petaca about forty years ago. Most of them are now dead, but their descendants and successors still live there,

and those of them not dead still live there and with their children cultivate the land." This was given in 1875. In 1875 JOSE YSIDRO BARELA testified before the surveyor general: "I have known the place all my life, having been born in the vicinity of and lived upon the tract. The town of Petaca, except when the hostilities of the wild Indians occasionally compelled a retreat to localities of security, has always been settled and occupied by its inhabitants, and when thus temporarily abandoned the people always returned to live there." The surveyor general, February 20, 1875, found in his decision that "It seems that the original grantees and their legal representatives have held and occupied the premises ever since they first took possession, except when driven off by hostile Indians, and are now in undisturbed possession. I have no doubt the papers of original title are genuine, and that the present claimants are acting in good faith."

FRANK A. CHAVES, page 39, testified:

Question. Were you born on the Petaca grant?
Answer. Yes, sir.
Question. How long had your father lived there before you were born?
Answer. I did not understand you. He had lived there since '36.
Question. Is your father alive?
Answer. No, sir; he died. It was in 1864.

The evidence shows his father was placed in possession and lived on the property until he moved to Conejos in 1855—*i. e*, nineteen years—and then his grandfather occupied it until he died.

SERAFIN PENA testified:

Question. Do you know how long those people occupied their land?
Answer. I do; yes, sir.
Question. For what time?

Answer. They occupied it all the time, &c. (p. 46).

Question. When did you first go to this land to occupy it and raise crops?

Answer. It must have been in the year 1838 or '36; I am not certain about the year.

JOSE MA. OLGUIN testified:

Answer. There was a man who had the grant for 11 years and abandoned it, and then we made a petition for this Petaca grant.

Question. In the year '36?

Answer. In '36.

Question. Do you know about—did they have their families with them?

Answer. Yes, sir; they were there with their families. At times they would take them there to dig their ditches and to make their farms, and then they would take them up where the Indians would come in and drive them out.

Question. What did they do there on this ground, those who made the petition on behalf of the others of you?

Answer. They cut the timber off, made ditches, and made their shanties.

Question. Did they cultivate the ground?

Answer. Yes, sir.

JOSE ANTONIO LUCERO testified, page 55:

Question. Well, after the grant was made, what did the people do there?

Answer. They worked there some.

Question. What kind of work?

Answer. They dug ditches and they began to make farms.

Question. Well, did they build houses there?

Answer. Yes, sir.

Question. From that time on did the people dwell continuously there or not?

Answer. They continued there some, but sometimes they would not be there on account of the Indians.

Question. Why did they have to leave on account of Indians?

Answer. On account of the small number of the men and on account of the hostilities of the Indians.

This evidence is without contradiction; it shows a continuous settlement, cultivation, and use of the land under the grant; that the parties in good faith complied. It was a frontier settlement and was occupied with much risk. The evidence shows many parties were killed by the Indians; still they persisted in occupying it to the present. When the United States troops occupied Mexico, it is a matter of history that the Indians, knowing of the war between the two nations, became hostile and drove in or killed most of the frontier settlers. Colonel Donophan made an expedition into the Navajo country before proceeding to Chihuahua with his regiment; this was in 1847, and without doubt in 1847 those settlers were compelled to go in under protection of the larger settlements and the army in that year. With the change of government they evidently supposed they must have some recognition, so the acts of the prefect in 1848, given in evidence, which clearly show the existence of this grant with the alcalde. The genuineness of the grant and continuous possession of the grantees for the purpose of settlement and cultivation are all that is required to establish it, even if it did not come from the archives. Certainly it was found with the successor of the alcalde, by whom it was ordered by the governor to be kept.

The evidence in this case shows the delivery of the possession by the alcalde, the entering into possession by the grantees residing upon the property, they and their assigns up to the present time, a period of sixty years, during which time there was no pretense that claimants were not the owners, or that any other person claimed the title to the property; those in possession have remained undisturbed, continuous, open, and notorious. It is insisted that a possession such as this, which is notice to the world, and when neither the government of Mexico nor of the United States

have undertaken to dispose of it to other parties, but have stood by and recognized the rights of such possession, obviates the necessity of proof of archive evidence in case there is any failure in this case.

In Pico *vs.* The United States (2 Wall., 282 and 283), the court says: "When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican government, reference must in the first instance be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises. In this case the genuineness of the grant is admitted, in addition to its being clearly proven, both as to the genuineness of the signatures executing it, as well as to the possession which was given, one of the witnesses testifying that he was actually present when it was done."

See also United States *vs.* Alviso, 23 How., 319; United States *vs.* Polack, Hoffman's Land Cases, 297; United States *vs.* De Horo, 22 How., 243.

It is admitted in this case that the signatures of all the parties to the grant are genuine. There is no question about that. There is no question about the possession having been given and about the parties having entered upon and complied with the terms of the grant under the rule. In United States *vs.* Chaves (159 U. S., 455), an occupation of a property for that length of time presupposes a grant. In this case we have actually proven one; and certainly when we claim a grant which is actually proven and the possession thereunder adverse, notorious, and continuous for over half a century without any interruption, the necessary archive evidence will be presumed; certainly when it

has been shown the archives of New Mexico have been lost and destroyed, to a certain extent, in regard to documents containing grants and land titles, as was adjudicated by this court in United States *vs.* Chaves (159 U. S., 463).

As we have said before in another brief, the Government not only waited until nearly all living witnesses were dead before authorizing the institution of these proceedings, but it so negligently cared for and kept the archives containing grants and documents affecting lands in the territory that large numbers of them became lost and destroyed; and now we insist it is inequitable in the Government, after having allowed a portion of the books and papers, as is shown by United States *vs.* Chaves, in 159 U. S., 463, to become lost or destroyed, to insist upon rigid proof. The proof of possession in good faith, the cultivation of the land, and the residing upon it and claiming it by the grantees, their heirs and assigns, is sufficient to establish the grant and sufficient to establish every essential which is necessary to make the grant valid, especially when we have produced from the public custodian of the archives the grant paper, which has been introduced in evidence. Possession, especially for so long a time, will take the place of archive evidence.

IV.

The boundaries as fixed by the court are not in accordance with the evidence or the weight of evidence, especially on the north, and most probably on the east.

We do not claim in any event more than *eleven leagues*, as the act of Congress creating the land court limits us to that.

The evidence as to the northern boundary, which in the act of juridical possession was fixed at the hill commonly called Tio Ortiz, shows that name is the one it commonly bore in February, 1836.

There is some slight evidence showing two hills called by that name—one further north than the other. We claim the great weight of the evidence, if not nearly all of it, shows the most northern hill to be the grant boundary.

FRANK A. CHAVES, page 35, testified that the Tio Ortiz hill is three miles east of the head of the Petaca river and at the head of the Arroyo de los Aguajes, north of the Aguajes and four miles southwest of the San Antonio mountain. He knew of no other hill by the name of Tio Ortiz.

SERAFIN PENA, page 43, testified that the Tio Ortiz hill is the north boundary of the grant; that the San Antonio mountain is east of it two or three miles; that he knows of no other hill by that name; that he knows the boundaries from those grantees who took possession in 1836, who occupied it all the time, except sometimes when interfered with by the Indians. He went there to raise crops in 1838 or 1836; never heard of a hill in neighborhood of Las Tusas called the Loma de Tio Ortiz (page 49), although he lived there.

JESUS MA. OLGUIN, page 51, testified that the north boundary was the Tio Ortiz hill. He was 26 years old in 1844, so was 18 when the grant was made; that the Tio Ortiz hill is west of the San Antonio mountain three or four miles; that he has known it from the time he was 12 or 14 years old (that is, before the grant was made), and it was always so called; that he herded sheep there, and never heard of any other hill called the Tio Ortiz hill; never heard of any hill by that name near Los Tusas.

JOSE ANTONIO LUCERO, page 56, testified that the north boundary is a hill by the name of Loma de Tio Ortiz, which is a hill at the head of the Arroyo de los Aguajes, about four miles west of the San Antonio mountain, which is a

little distance northwest of the hill; he was 76 years old, and says he has known the hill since he was very young; that he was born at Ojo Caliente, near this grant, and now lives in Correjos, Colorado, it being almost at the line of Colorado, which passes over the San Antonio mountain. He says he never heard of any other hill near Las Tusas called Tio Ortiz hill.

AGAPITO TRUJILLO, page 59, testified that he lived at Petaca over 50 years; that he knows the grant; its northern boundary is Tio Ortiz hill, about four miles southwest of the San Antonio mountain; that he never heard of any other hill called the Tio Ortiz.

ARICETO MARTINEZ, page 60, testified that he had lived on the grant and knew it. His mother and father had lands there; that he knows the Tio Ortiz hill; it is at the head of the Arroyo de los Aguajes, about four or five miles from the San Antonio mountain, which is to the northeast of it. He has heard it called Tio Ortiz since he was ten or twelve years old, and never heard of any other hill called Tio Ortiz.

ANTONIO ABEYTIA TORRIO, page 71, on cross-examination says the Tio Ortiz hill is on the side of the San Antonio mountain where there is a lake at the base. (This on cross-examination; he was a witness for appellant.)

The evidence introduced by appellant as to the Ortiz hill being at or near Las Tusas is almost nothing, and the witnesses are also very contradictory and speak of hearsay of parties who are still living. Boundaries may be proven by general repute and hearsay of old witnesses who are dead; if alive they are the best evidence, their declarations not.

ANTONIO M. ORTEGA, a witness for appellant, testified he knew the Tio Ortiz hill, and that it is about ten or twelve

miles north of Petaca (which would place it just a little southwest of the San Antonio mountain).

JUAN ANTO. PENA, witness for appellant, testified, page 94, he heard of a hill called Tio Ortiz, near the San Antonio mountain, but had never heard of any other hill by that name.

DESIDERIO ORTIZ, page 106, testified he knew the Tio Ortiz hill; it was to the north, near the San Antonio mountain, five or six miles southwest.

There can be no such question here as in the Sandoval and Santa Fé or the Cañon de Chama cases. Those were all under the Spanish law, long before the Mexican colonization law of 1824 and regulation of 1828. Our grant is under Mexican law; it was made in 1836, before the adoption of the constitution of 1836 or the law of April 4, 1837; so neither the Spanish law, nor the constitution of 1836, nor the law of April 4, 1837, affects it. It was a colonization grant, either directly to the three grantees or to them as empresarios, and was either made direct or by a denouncement proceeding. In either case the parties complied with the grant, entered into possession, lived on it, and cultivated it up to the present time from the date of the grant.

This court has repeatedly decided that the *only laws* in force in the territories of Mexico for the disposition of the public lands, with the exception of those referring to missions and towns, are the law of August 18, 1824, and the regulations thereunder of November 21, 1828.

Van Reynegan *vs.* Bolton, 95 U. S., 33.
United States *vs.* Vigil, 13 Wall., 457.
Fremont *vs.* U. S., 17 How., 542.
Hornsby *vs.* U. S., 10 Wall., 224.
And over a dozen other cases.

Article 1 of those regulations under said law provided that the political chief should grant lands to contractors (empresarios), families, or private persons for settlement and cultivation; nothing else. No right in the land was reserved to the Government (as under the Spanish law in the case of grants to municipalities) of the disposal of common lands. The unallotted lands under the Mexican law and regulations were commons for the grantees, to be held, appropriated, used, and disposed of by them. Settlements such as this were contemplated by those regulations. Surely, when we consider that the governor directed the land to be given to the petitioner and "his associates," we may consider he had in contemplation something like an empresario grant.

Maxwell Land Grant Case, 121 U. S., 262.

There could be no forfeiture except by means of a denouncement proceeding which was judicial in its nature.

Fremont *vs.* U. S., 17 How., 542.

The grantees were required to occupy the land five years. They occupied it all the time to the present, five years at least. There is no evidence the grant was unoccupied at any time except when Indians drove off the settlers, and then they returned immediately.

The proceedings of 1848 do not claim or intimate there was an abandonment or ever had been. The absence of the petition or application for that proceeding, which might show the reason for it, is certainly suspicious. Why did not appellants put it in evidence? Was it because it would disprove their contention?

There is no proof that the eastern boundary was altered after the grant was made (as stated by Judge Sluss in his opinion). On the contrary, the only proof is that of the witness Barela, who was the secretary of the alcalde, and he says he wrote the act of juridical possession and it is the

one he wrote. If it was changed after signature, it was so done in the surveyor general's office; but we insist that, its genuineness being established and the possession uncontradictedly shown, and it coming from the hands of the secretary of the alcalde and his successor as a justice of the peace, it comes from proper hands, and that the boundaries therein fixed are the true boundaries. As the grantees and their legal representatives have not been connected with any change, they should not in any event be charged with fraud. If a fraud was attempted it can be set aside and the correct boundary taken without doing harm to innocent parties.

Appellants' counsel contends that the attempt was made to alter the eastern boundary in the juridical possession so as to include the Tio Ortiz hill on the north. An examination of the map of survey included in the transcript will refute that contention. It will be seen by that map that the mesa of Petaca is east of the Petaca creek and is marked thereon "pine and spruce." If that mesa is followed over the top or along its western edge to its most northern point, and then a line is drawn from the most northern point thereof until it reaches as far north as the Tio Ortiz hill, as shown on that map, it will be seen that the hill will fall to the west of that line and be on the northern boundary. When natural objects are called for, a survey must follow them as far as they reach, and thereafter the line must run according to the cardinal points, just as we have suggested.

They have always held the property up to the boundaries proved. As we are limited to eleven leagues by the act of Congress, there can be no special object in claiming to the east beyond what the court gives. We, however, do not admit that the grant should be limited on the east, as the land court has attempted to do. The grant possesses all the essential requisites to *bind* the Government to confirm it.

Besides, the long possession, which is undoubted and un-

questioned under the case of United States *vs.* Chaves, 159 U. S., 463, establishes a presumption of a grant which is equivalent to a perfect title.

There can be no contention that the parties who were placed in possession in 1848 by order of the prefect, except such of them as were original grantees or heirs or assigns thereof, can be the owners of the grant. It will be noticed that the petition, which should have preceded that decree of the prefect, is not among the papers or introduced in evidence; undoubtedly it would have thrown light on those proceedings; and yet that decree only directs that those persons be repossessed who are "*noted down in the grant of said possession*, which ought to be in the archives under your charge;" so that only the old grantees and their legal representatives could have been included; but it recognizes the existence of the grant and directs to repossess the parties under the Constitution of the United States.

What may have been the reason for this is kept back by the appellant, who does not introduce in evidence the application to have these proceedings taken by the prefect.

We ask for a confirmation with the boundary on the north to the Tio Ortiz hill, situate about four miles west or southwest of the San Antonio mountain, and on the east to the boundary expressed in the act of the juridical possession.

T. B. CATRON,
Of Counsel for Appellees.